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TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

EDWIN ANTONIO OSORIO-LOPEZ, Appellant

v.

State of Texas, Appellee

Appeal from Upshur County, Trial Causes 17,914 & 17,927
Nos. 06-18-00197-CR & 06-1800198-CR

RESPONDENT'S BRIEF ON THE MERITS

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Did the Court of Appeals overstep its authority by requiring counsel during a Retrospective Competency Trial?

STATEMENT OF FACTS

During the pendency of this case, Osorio-Lopez has had a long history of mental issues that pre-date the charges that are currently under appeal. He was indicted for Evading Arrest with a Vehicle with an offense date of November 17, 2017 (CR 5 [06-18-00198-CR])[1]. The actions that resulted in Osorio-Lopez's arrest for Evading also involved actions that resulted in his arrest and indictment for the offense of Unauthorized Use of a Vehicle (Supp. CR 5 [17195 Record])[2]. After his arrest, and during his incarceration, he was charged with Aggravated Assault with Deadly Weapon with an offense date of December 14, 2017 (CR 5 [06-18-00197-CR]). The victim of the assault charge was a Jailer and the deadly weapon was a food tray *Id*.

On March 22, 2018, the Court signed the initial *Order for Examination Regarding Incompetency*, ordering Dr. Thomas Allen, a licensed Psychologist, to

[1] In each of the cases before this Court, Osorio-Lopez has different cause numbers from the Trial Court to the 6th Court of Appeals, and now in the Court of Criminal Appeals. For purposes of this brief, the number associated with the Court of Appeals has been included to ease references to the Clerk's Record in each respective cause.

[2] This specific Supplemental Clerk's Record is from Trial Court Cause number 17915 and was filed with the 6th Court of Appeals on April 10, 2019 in each of the appealed causes. The documentation contained in this specific record will be later referenced for purposes of Competency Evaluations, as this is the cause in which Osorio-Lopez was initially evaluated.

examine Osorio-Lopez (Supp. CR 23 [17915 Record]). On April 23, 2018, Dr. Allen's Report was filed, with the conclusion that he was "Incompetent to Stand Trial" (*Id*. at 27). At this point, Dr. Allen listed diagnosis as (1) Psychotic Disorder NOS, (2) Cannabis Use Disorder, and (3) Stimulant Use Disorder by History in Remission, and stated that Osorio-Lopez was taking "Olanzapine (antipsychotic) and Vistaril (allergies and anxiety)" (*Id*. at 28, 30). Three days later, on April 26, 2018, the Court signed an *Uncontested-Incompetent to Stand Trial and In-Patient Mental Health Services Order* (*Id*. at 32).

On August 10, 2018, the Court received a letter from Dr. Larry Hawkins, with the Rusk State Hospital, indicating that Osorio-Lopez's competency had been restored (Supp. CR 36 [17915 Record]). In the attached report, Dr. Sarah Rogers, a licensed Psychologist with Rusk State Hospital, recounted how he had gained 20 pounds during his treatment at their hospital, and had previously been treated at North Texas State Hospital, where he had previously been diagnosed with "Unspecified Bipolar and related disorder" and that "he is currently taking a mood stabilizer and an antipsychotic" (*Id*. at 37-8).

On October 5, 2018, Trial Counsel filed a *Motion to Withdraw As Counsel*, citing an inability to effectively communicate (CR 21). When heard on that Motion, Counsel cited that Osorio-Lopez thought his trial counsel, Mr. Patton, had

represented him in Ft. Worth on some unrelated charges, allegations that Mr. Patton denied (4 RR 4-11). The Court denied the withdrawal request (4 RR 11).

Immediately before Voir Dire, the Court again addressed the Defendant, to which, he renewed his claims that he had previous problems with Mr. Patton in Ft. Worth (7 RR 7). At this point, the Court questioned Mr. Patton about whether he had ever practiced in Ft. Worth, to which Patton answered in the negative, and the Court again denied the Motion to Withdraw (7 RR 7).

The next day, when the trial was to commence, Defense Counsel filed a *Motion for Continuance* seeking additional time to have Osorio-Lopez re-evaluated (CR 34). Specifically, Counsel cited "Communications have deteriorated to the point that Defendant is adamant that undersigned counsel had represented him on a prior matter in Tarrant County and despite all attempts…this thought remains with Defendant" (CR 34). At the hearing, Counsel said, "it appeared to me that he obviously had a lot of in my opinion irrational thoughts that he deemed were factual" (6 RR 10). The Court denied the Defense's request (6 RR 12). The jury went on to convict him of both charges.

After the initial appeal, the 6th Court of Appeals Ordered the Trial Court to determine the feasibility of a retrospective competency trial. On November 5, 2019, the Court heard argument from the parties and determined that a retrospective competency trial was feasible and appointed Dr. Thomas Allen to

again evaluate Osorio-Lopez (Supp RR 10)[3]. At that time, Appellant's Counsel was under the impression that Osorio-Lopez was not taking any medications, while the State's Attorney was under the impression that he was taking some but not all of his prescribed medications (Supp. RR 7,8).

On February 25, 2020, the trial court held the retrospective competency trial (Supp RR 1)[4]. Immediately after swearing in the interpreter, the Court took up Defense Counsel's oral motion to withdraw (Supp RR 6). Immediately after granting the lawyer's withdrawal, the State said,

> Your Honor, prior to calling any witnesses, we have agreed to stipulate to the doctor's report, the Court should have those available in their file. If the Court does not have them available, I do have copies for the Court. The most recent one was in December 2019, which is referring to the proceedings here today that found Mr. Lopez competent to proceed in this competency trial… Your Honor, we have stipulated and ask that you take judicial notice of those files (Supp RR 6-7).

The State then called their first witness, Jon Kregel, the interpreter from the jury trial (Supp RR 7). Osorio-Lopez had no cross examination. Then, the state called its final witness, Billy Byrd, the duly elected District Attorney (Supp. RR 11). What follows is Osorio-Lopez's cross examination.

> Q Are you competent to say in court that you were accusing me with Mr. Michael that was in Fort Worth when he had the last court in Fort Worth?
> A I'm sorry, can you re-translate that again, the question. Did you say Michael?

[3] Supplemental Reporter's Record from November 5, 2019 hearing.
[4] Supplemental Reporter's Record from February 25, 2020 hearing.

Q Are you competent here to stand here to say that you were competent to say that I had a hearing in Fort Worth, a hearing there in Fort Worth?
A I can't respond of what may or may not have happened in Fort Worth, Texas. What the Court and what I was concerned with were the proceedings here in Upshur County, Texas
Q Okay. Thank you.
THE COURT: Anything else, Mr. Lopez?
THE DEFENDANT: No. (Supp RR 16)

At the conclusion of the proceedings, the trial court signed the *Order Finding Defendant Competent During Original Trial* (Supp CR 4)[5].

The Defense timely filed a *Motion for New Trial and Motion in Arrest of Judgement* on March 26, 2020 (Supp CR 3)[6] then the Court of Appeals issued a *Memorandum Opinion* on March 27, 2020. Counsel for Osorio-Lopez then filed a *Motion for Rehearing*, which the Court ultimately requested Briefs and heard Oral Arguments on.

Argument

The Court of Appeals arrived at the right conclusion in ordering a new retrospective competency trial. The prospect of competency litigants representing themselves flies in the face of common sense and provides an opportunity for widespread abuse of the process. To find an example of this, one need look no further than the case at hand. Once an individual, who throughout his journey in the criminal justice system has demonstrated problems with understanding

[5] Supplemental Clerk's Record filed with the 6th Court of Appeals on March 9, 2020.
[6] Supplemental Clerk's Record filed with the 6th Court of Appeals on April 15, 2020.

proceedings, accused his attorney of representing him elsewhere, had been diagnosed with mental illnesses and prescribed medication, is allowed to represent himself, the State relies on the withdrawn attorney's stipulation to admit evidence. The record is clear, the State represented to the Court that they had an agreement to admit evidence. Dispensing with the need to actually furnish the evidence presented, the Defendant never so much as had an opportunity to look at the exhibits that the State admitted. Interestingly enough, the reports that the State relies on in the retrospective competency trial seem to have not made their way into the numerous supplemental records in this cause.

46B.006 Requires the Appointment of Counsel

Petitioner's Brief attacks the Court of Appeals rationale by arguing that the language of Tex. Code Crim. Proc. Art. 46B.006 is discretionary as opposed to mandatory. A full reading of both sections of that specific statute demonstrates that the appointment of counsel is mandatory. There has been no objection or contention on the part of Petitioner that Osorio-Lopez was not indigent. Per section (b), "If the defendant is indigent and the court has not appointed counsel to represent the defendant, the court ***SHALL*** appoint counsel as necessary to comply with section (a)" Tex. Code Crim. Proc. Art. 46B.006 (emphasis added). Taking into account Osorio-Lopez's financial situation, counsel had to be appointed.

Notwithstanding his lack of resources, a reading of section (a) demonstrates that a defendant is "entitled" to representation. Per *Black's Law Dictionary*, the definition of the root word entitle is "To grant a legal right or qualify for" (11th ed. 2019). While the Court of Appeals analysis did not get into the minutia of this statute, for an individual to effectively waive a right that they have a legal right to, it is incumbent on the Trial Court to admonish the defendant on the rights that they are waiving. In the instant case, when the trial court was speaking with Osorio-Lopez, the ramble that he said does not make sense.

1.051 Requires the Appointment of Counsel

In addition to the requirements of the 6th and 14th Amendments of the Constitution giving criminal defendants in state courts a right to counsel, Art. 1.051 of the Code of Criminal Procedure requires appointment as well. Art. 1.051, explicitly states, "A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding." It is the belief of Respondent that there is no issue about whether or not Osorio-Lopez was entitled to counsel, as there has been no contention that the Retrospective Competency Trial does not meet the definition of an "adversarial judicial proceeding."

TCCP 1.051(f) guides the process of an individual withdrawing their right to counsel, and explicitly requires that such withdrawal be done in writing. No such writing was done in this matter. Furthermore, as previously argued in *Appellant's*

Brief on Competency, as *Dolph v. State* outlines, any waiver of right to counsel must be (1) competent, (2) knowing and intelligent and (3) voluntary 440 S.W.3d 898, 902 (Tex.App.-Texarkana 2013). The facts of this case demonstrate that no such examination was done by either the Court, withdrawing Defense Counsel, nor the State.

Trial Court Abused it's Discretion in Granting the Attorney's Withdrawal

While the Court of Appeals opinion did not delve into error on the part of the trial court, Respondent contends that even if that Court erred in creating a rule barring self-representation in retrospective competency trials, the trial court erred in granting the withdrawal of counsel, necessitating the same result: a new retrospective competency trial. As *Dolph* stated,

> "When an accused manages his own defense, he relinquishes ... many of the traditional benefits associated with the right to counsel." *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525. These rights must be waived "(1) competently, (2) knowingly and intelligently, and (3) voluntarily." *Collier*, 959 S.W.2d at 625 (citing *Godinez v. Moran*, 509 U.S. 389, 400–01, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); *Faretta*, 422 U.S. at 834–36, 95 S.Ct. 2525). "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525 (quoting *Adams*, 317 U.S. at 279); see *Collier*, 959 S.W.2d at 625. "The decision is made 'voluntarily' if it is uncoerced."3 *Collier*, 959 S.W.2d at 625 (citing *Godinez*, 509 U.S. at 401, 113 S.Ct. 2680). *Dolph v. State*, 440 S.W.3d 898, 902 (Tex. App.- Texarkana 2013).

Assuming for a moment that Osorio-Lopez was competent at the time of the retrospective competency trial, no substantive admonitions were given to him at that time.

Counsel requested "Can I briefly ask my client whether he wants to proceed with me or without me?" (Supp. RR 4). When asked if he understood that Counsel was his trial counsel, Osorio-Lopez replied:

> Yes, I understand you were my present attorney but I had a change of attorney when he said the last court hearing when I was with the other attorney that he was going to leave when the other one returned. So my attorney sent me the last letters. And my attorney, doctor, judge told me that I was competent to be in court, to the rule of the court. (Supp. RR 5)

Trial Counsel then asked, "Would you like for me to ask questions of the State's witness or are you wanting to ask the questions yourself?" to which Osorio-Lopez replied, "I want to be my own judge, my own attorney to listen to the rules to see if I'm competent for that to return under oath (Supp. RR 5). After counsel approached the bench, the Court asked Osorio-Lopez, "Mr. Lopez, do you understand that you have the right to have an attorney present with you?" to which Osorio-Lopez replied, "I lost him to see who I could – I'm going to be representing myself." The Court then inquired as to whether he wanted to represent himself. Osorio-Lopez replied "Yes" (Supp. RR 6). The Trial Court replied, "All right. That's fine" (Supp. RR 6).

At no point during the interaction surrounding Osorio-Lopez's loss of counsel is there an inquiry that either meets the requirements of *Farretta* or even mirrors the language of 1.051(f).

This goes to a broader point, which Petitioner argues that a Trial Court should take a "wait and see" approach, maybe even appoint stand-by counsel in situations where competence and effective waiver are "simultaneously at issue." The facts in this case are obvious. Osorio-Lopez does not make any sense and there was no standby counsel.

Next, Petitioner rationalizes that counsel may be required for competency hearing, but not for a retrospective competency hearing? In its consideration of what to do, this Court has an obligation to take a long look at potential ramifications with following the Petitioner down this rabbit trail. Where does the statute differentiate between counsel for competency versus retrospective competency? It is fair to assume that individuals facing competency hearings stand at least a reasonable chance of suffering from some form of mental illness or disease. Why muddy the issue? The question before this Court isn't so much a dramatic curtailing of trial court power of "forbidding a trial court from ever allowing self-representation" as protecting individuals suffering from severe mental illness from themselves.

Immediately before its conclusion, Petitioner states, "In any case, the hearing does not suggest Appellant was acting bizarrely or saying irrational things, even if his statements or questions were not carefully articulated or precisely on point." Osorio-Lopez thought that his attorney was someone else. The only meaningful contribution he had was the cross-examination of the Elected District Attorney, that he (the District Attorney) could not understand Osorio-Lopez enough to provide an actual reply. We argue that Osorio-Lopez is doing everything the Petitioner claims he is not doing. He's acting bizarrely, saying irrational things, and can't help himself. He is an example of the people our system is supposed to protect, but is failing in a dramatic fashion.

Respondent respectfully agrees with the contention of Petitioner that this issue rises to a level that must be addressed by this Honorable Court, however, we respectfully disagree with the conclusion that this Court must make. As the long arc of history has demonstrated with our founding principles, the journey to a more perfect union requires that we proactively address these mental health concerns by treating the most vulnerable in our community with the compassion and respect that they deserve. This is one of those times that requires us not abandon our better angels.

PRAYER

WHEREFORE, PREMISES CONSIDERED, for the foregoing reasons, Respondent respectfully prays that this Honorable Court affirm the Court of Appeals Opinion and Order a New Retrospective Competency Trial in this matter.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's computer-generated Brief contains 3,112 words (relying on the word count of the computer program) and is in compliance with Rule 9.4(i)(2)(c) of the Texas Rules of Appellate Procedure.

/s/Jonathan Hyatt
Jonathan Hyatt

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief on the Merits has been delivered by e-file service to Emily Johnson-Liu, on this, the 30th day of November, 2021.

/s/Jonathan Hyatt
Jonathan Hyatt

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